

¹ Request for Board Review (filed Feb. 27, 2006).

Claimant argues the preliminary hearing Order should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant suffered a compensable injury to his low back on September 20, 2004, and has been the recipient of a significant amount of diagnostic tests, numerous evaluations and treatment at the hands of no less than 11 physicians, all at respondent's request or pursuant to an independent medical examination order. Dr. Frederick Smith, one of the physicians designated by respondent, evaluated claimant on June 10, 2005 and recommended a decompression of the nerve root if his pain continues, suggested claimant have selected nerve root injections or a dorsal column stimulator.

Based upon that request, claimant filed a request for a preliminary hearing seeking the treatment outlined by Dr. Smith. That preliminary hearing was scheduled for August 9, 2005. At that hearing, the ALJ issued an Order indicating the parties agreed to an Order in lieu of a hearing. That Order directed Dr. Paul Stein to examine and evaluate claimant to determine if additional treatment is necessary, and if so, provide treatment or make recommendation for treatment with a referral.²

Dr. Stein examined claimant and made a series of recommendations, all of which respondent has provided. This included a surgical consult with Dr. Robert Eyster and a psychiatric examination with Dr. Ted Moeller. Dr. Stein also suggested a spinal cord stimulator, assuming Dr. Moeller indicated claimant was an acceptable candidate.

Claimant renewed his request for treatment as a predicate for another preliminary hearing, specifically requesting Dr. Stein's treatment, in a letter to respondent's counsel on September 23, 2005. After an agreement to postpone the proceedings, a preliminary hearing was ultimately scheduled for February 13, 2006. Following that hearing, the ALJ granted claimant's request for the surgery outlined by Dr. Smith, although she did not designate Dr. Smith as the provider. She merely designated "back surgery" as the medical treatment to be provided as respondent's cost.

Respondent maintains two main arguments. It contends that it has provided all the treatment ordered by Dr. Stein, who was authorized to conduct an independent medical examination. Thus, it has not only complied with the Court's August 9, 2005 Order, but has also provided the medical treatment requested by claimant, in that claimant's last letter of intent asked only for treatment with Dr. Stein. And it further argues claimant's request for the surgical treatment outlined by Dr. Smith was not the subject of the latest letter of intent. For these reasons, respondent asserts the ALJ had no authority to order it to provide surgery when the court-ordered physicians have not made that recommendation.

² ALJ Order (Aug. 9, 2005).

Claimant argues that Dr. Smith was a physician selected by respondent and he recommended surgery in June 2005. And Dr. Eyster, a physician claimant was referred to for a surgical consultation by Dr. Stein, has opined that surgery is available but likely only to be 25 percent successful. According to claimant's counsel, this case illustrates an adjuster's attempt to shop for an opinion that excludes surgery. Whether that is in fact the case is not before the Board at the present time.

Before considering the parties' arguments, the Board must determine whether it has jurisdiction to review this matter. Although there are a number of arguments being advanced by respondent, including an allegation that the ALJ exceeded her jurisdiction, distilled to its simplest terms this is a dispute over medical treatment.

The Board's review of preliminary hearing orders is limited. Not every alleged error in law or fact is subject to review. The Board can review only allegations that an administrative law judge exceeded his or her jurisdiction.³ This includes review of the preliminary hearing issues listed in K.S.A. 44-534a(a)(2) as jurisdictional issues, which are (1) whether the worker sustained an accidental injury, (2) whether the injury arose out of and in the course of employment, (3) whether the worker provided timely notice and timely written claim, and (4) whether certain other defenses apply. The term "certain defenses" refers to defenses which dispute the compensability of the injury under the Workers Compensation Act.⁴

Respondent's appeal does not involve any one of the jurisdictional issues set forth in K.S.A. 44-534a(a)(2). As indicated above, this is a dispute over medical treatment, an issue the Board does not typically have jurisdiction over at this juncture. However, respondent alleges the ALJ exceeded her jurisdiction in ordering surgery and that allegation vests the Board with jurisdiction, at least to determine whether the ALJ exceeded her jurisdiction.

First, the Board has previously held, and continues to hold, that the Division retains jurisdiction over the parties and the issues presented at the initial preliminary hearing. Therefore, later hearings conducted to address those same preliminary hearing issues are treated as a continuation of the initial hearing. That interpretation of the Act affords the parties expeditious hearings and avoids cumbersome procedures that would only serve to delay prompt decisions.

This means that claimant's original request for surgery which was the subject of the August 2005 preliminary hearing was still properly before the ALJ at the preliminary hearing on February 13, 2005. The fact that no transcript was created following the August 2005

³ K.S.A. 2004 Supp. 44-551.

⁴ *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

hearing is of no consequence. The parties *agreed* to an order for an independent medical examination in lieu of a formal hearing and the ALJ asked Dr. Stein, the independent medical examiner, to comment on treatment options and if he required additional assistance from other physicians in rendering that opinion, those physicians were authorized. One of those he consulted with, Dr. Eyster, has opined that surgery is an option, albeit one that has a 25 percent chance of success. And Dr. Smith recommended surgery as far back as June 2005. So, as of the preliminary hearing in February 2006, there were two opinions that surgery was a viable option.

Claimant testified that he is willing to undergo surgery as none of the other treatment options have provided any relief. And he would prefer to begin with the decompression surgery, as recommended by Dr. Smith, and then, if needed, resort to the implanted stimulator.

After hearing this testimony and undoubtedly reviewing the medical records in this case, the ALJ determined that claimant should have the surgery he requested. The Board finds that the ALJ had the authority to address claimant's ongoing request for further medical treatment, in the form of surgery, as recommended by Dr. Smith. And she did not exceed her jurisdiction in awarding that treatment. Obviously, the ALJ had not truly resolved that issue merely by appointing a physician to conduct an IME. Thus, respondent's characterization of the issue of surgery as a stale one is wrong. Likewise, respondent wrongly characterizes the ALJ's decision to award surgery as something that "conflicted" with the treatment provided by Dr. Stein. As indicated above, Dr. Stein referred claimant to Dr. Eyster, who indicated surgery was an option, with significant risks, but an option. Because the Board does not find the ALJ exceeded her jurisdiction, the Board has no option but to dismiss the respondent's appeal.

WHEREFORE, it is the finding, decision and order of the Board that the appeal of the Order of Administrative Law Judge Pamela J. Fuller, dated February 14, 2006, is dismissed.

IT IS SO ORDERED.

Dated this _____ day of April, 2006.

BOARD MEMBER

c: Gerald O. Schultz, Attorney for Claimant
Robert J. Wonnell, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director